

## Message Text

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ACTION L-02

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FM AMEMBASSY BERN

TO SECSTATE WASHDC 316

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E.O. 11652: N/A

TAGS: PFOR, CFED, SZ (JUDICIAL ASSISTANCE TREATY)

SUBJ: SWISS TREATY AND SWISS IMPLEMENTING LEGISLATION

REF: STATE 42846

1. EMBOFF CALLED ON DR. MARKEES FEB. 26 TO FURTHER DISCUSS ART. 26 OF IMPLEMENTING LEGISLATION IN LIGHT OF REFTTEL. DISCUSSION CENTERED ON POLITICAL AND TECHNICAL ASPECTS OF PROBLEMS WITH ART. 26.

2. POLITICAL: DR. MARKEES STATED IT WOULD BE "PRACTICALLY USELESS" TO TRY TO CHANGE ART. 26 NOW. UPPER HOUSE OF PARLIAMENT (STAENDERAT) SCHEDULED TO DEBATE TREATY AND IMPLEMENTING LEGISLATION MARCH 19. DR. MARKEES SAID THAT OPPONENTS OF TREATY WOULD ATTEMPT TO USE ANY CHANGES IN IMPLEMENTING LEGISLATION AT THIS TIME AS MEANS TO ATTACK TREATY BY ARGUING SUCH A CHANGE WOULD BE A FURTHER CONCESSION TO U.S. (DR. MARKEES AGREED THAT IN FACT IT WOULD NOT BE A TRUE CONCESSION SINCE GOS WOULD MERELY BE COMPLYING WITH PROVISION IN ALREADY SIGNED TREATY BUT HE SAID "FROM OPTICAL POINT OF VIEW" IT WOULD BE HARMFUL.) DR. MARKEES SAID THAT IN ADDITION TO AFFECT CHANGE WOULD HAVE ON TREATY RATIFICATION CHANGE WOULD ALSO CAUSE "GRAVE POLITICAL PROBLEMS" IN RELATIONSHIP BETWEEN FED. GOVT AND CANTONS. CONSTITUTIONALLY FED. GOVT CANNOT LEGISLATIVELY COMPEL CANTONS TO ALTER PROCEDURAL CODES  
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BUT FED. GOVT MAY REQUIRE CANTONS TO COMPLY WITH SWISS

TREATY OBLIGATIONS. DR. MARKEES SAID CANTONS WOULD RESENT FED. GOVT USING TREATY AS MEANS TO DO WHAT FED. GOVT WOULD, IN THE ABSENCE OF A TREATY, BE FORBIDDEN TO DO.

3. DR. MARKEES REPEATED HIS BELIEF THAT IN PRACTICE HE DOES NOT THINK "GREAT DIFFICULTIES" WOULD ARISE FROM ART. 26 AS DRAFTED ALTHOUGH HE AGREED THAT "ONE CANNOT EXCLUDE THE POSSIBILITY THAT A RELUCTANT WITNESS WOULD TRY TO HAMPER (SIC) AMERICAN PROCEDURES". DR. MARKEES THEN SAID THAT IF EXPERIENCE (AFTER TREATY IN EFFECT) REVEALS PROBLEMS WITH ART. 26 GOS COULD POSSIBLY CONSIDER CHANGING IT. IN COURSE OF CONVERSATION DR. MARKEES SEVERAL TIMES ASKED "WHY SO LATE?" "WHY WASN'T THIS PROBLEM BROUGHT UP BEFORE?" HE SAID IF MATTER RAISED 3 OR 4 MONTHS AGO ART. 26 MIGHT HAVE BEEN CHANGED.

4. TECHNICAL: DR. MARKEES STATED ART. 26 DRAFTED BY ROBERT PFUND WHO WAS THEN IN FED. TAX ADMINISTRATION BUT IS NOW RETIRED. DR. MARKEES PHONED MR. PFUND FOR HIS OPINION ON THIS SUBJECT. MR. PFUND POINTED OUT THAT FED. SUPREME COURT HAS STATED DEFINITELY THAT IN TAKING TESTIMONY UNDER CANTONAL PROCEDURAL CODES WITNESS MUST BE ADMONISHED TO TELL TRUTH, MUST BE ADVISED OF CONSEQUENCES FOR FAILURE TO TELL TRUTH AND MUST BE TOLD THAT RECORD WILL INCLUDE SUCH INSTRUCTIONS. AFTER WITNESS HAS TESTIFIED HE MUST SIGN TRANSCRIPT. NORMALLY SIGNATURE IS ONLY "CONFIRMATIVE" BUT PFUND AND MARKEES SUGGESTED IN CASES ARISING UNDER TREATY CANTONAL AUTHORITIES WOULD BE INSTRUCTED TO HAVE WITNESS SIGN "CONFIRMING THAT STATEMENT IS TRUE". DR. MARKEES POINTED OUT THAT SUBSTANTIVELY SWISS AND AMERICAN PROCEDURES EQUIVALENT. WITNESS REMINDED OF OBLIGATION TO TELL TRUTH AND OF PENALTIES FOR PERJURY. HE AWARE, HOWEVER, OF "FORMALISTIC" NATURE OF AMERICAN EVIDENTIARY REQUIREMENTS.

5. DR. MARKEES MENTIONED NEGOTIATING HISTORY ON THIS SUBJECT IN PASSING BUT DID NOT DEVELOP POINT. EMBOFF STATED (PER PARA 5 REFTTEL) THAT US BELIEVES THAT IT IS UP TO SWISS TO RESOLVE MATTER AND MENTIONED ALTERNATIVES SET FORTH IN PARA 5 REFTTEL. DR. MARKEES MERELY SMILED AT LIMITED OFFICIAL USE

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SUGGESTION MATTER COULD BE SOLVED BY "RE-INTERPRETATION OF EXISTING LEGISLATION". TO THE SUGGESTION OF AN EXCHANGE OF NOTES HE REPLIED "WHAT WOULD IT ADD?". HIS ANSWER TO THE SUGGESTION THAT THE LEGISLATION BE AMENDED IS DESCRIBED ABOVE.

6. RECOMMENDATION: EMBASSY AGREES WITH DR. MARKEES' ANALYSIS OF POLITICAL SITUATION AND SUGGESTS THAT NO

EFFORT BE MADE WHICH WOULD DERAIL TREATY RATIFICATION  
PROCESS. AFTER TREATY IN EFFECT AND IF PROBLEMS DEVELOP  
IN PRACTICE UNDER ART. 26 , USG MAY REQUEST THAT GOS HONOR  
TREATY COMMITMENTS AND AMEND LEGISLATION TO COMPLY WITH  
TREATY. ALTERNATIVELY/ADDITIONALLY EMBASSY SUGGESTS DEPT  
MAY WISH INVESTIGATE POSSIBILITY THAT TESTIMONY OBTAINED  
AS DESCRIBED PARA 4 ABOVE BE CONSIDERED ADMISSIBLE IN U.S.  
COURTS.

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